STATE OF MICHIGAN

COURT OF APPEALS

MICHIGAN DEPARTMENT OF TRANSPORTATION, Plaintiff-Appellee,	UNPUBLISHED January 18, 2007
v	No. 263615 Ottawa Circuit Court
SB PROPERTIES, L.L.C., Defendant-Appellant.	LC No. 02-043871-CC

Before: Saad, P.J., and Cavanagh and Schuette, JJ.

PER CURIAM.

Michigan Department of Transportation (MDOT) took part of defendant's property to widen a road. Defendant challenged the amount of compensation MDOT offered for the property and a jury awarded $90,000 as just compensation for the taking.

Defendant contends that the trial court erroneously gave the jury a special instruction that it need not award compensation for defendant's cost to construct a new commercial driveway if MDOT offered to reconnect the original driveway. According to defendant, it lost the driveway as a direct result of the taking and defendant then had to relocate and construct a shared driveway with an adjacent property owner. Plaintiff asserts that the costs of the new, shared driveway were not a result of the taking, but were required because defendant decided to develop land that was vacant at the time of the taking.

The trial court denied MDOT's motion in limine to exclude testimony about defendant's additional expenses for the construction of the new driveway. However, it granted MDOT's request for a special instruction that directed the jury to decide whether defendant's driveway expenses were incurred because of the taking—that is, were the expenses required to make defendant whole, or were they a result of defendant's development of the property and would have been required even if the road project had never commenced. After the jury announced its verdict, defendant moved for a new trial and argued that, among other errors, the trial court should not have given the special instruction.

We review a claim of instructional error de novo. *Stadium Authority v Drinkwater*, 267 Mich App 625, 632; 705 NW2d 549 (2005). We review a trial court's denial of a motion for a new trial for an abuse of discretion. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 761-762; 685 NW2d 391 (2004). An abuse of discretion occurs when the trial court chooses an outcome

that falls outside of a principled range of outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 372 (2006); *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

Jury instructions must be reviewed as a whole to determine whether there is error requiring reversal, and the instructions should include all the elements of the plaintiff's claims and not omit material issues, defenses, or theories if the evidence supports them. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). A trial court may give a special jury instruction "as long as the instruction accurately states the law and is understandable, concise, conversational, and nonargumentative. *Novi v Woodson*, 251 Mich App 614, 630; 651 NW2d 448 (2002). As this Court further explained:

> Supplemental instructions need not be given if they would add nothing to an otherwise balanced and fair jury charge nor enhance the ability of the jury to decide the case intelligently, fairly, and impartially. Moreover, it is error to instruct a jury with regard to a matter not sustained by the evidence or the pleadings. [*Id*.]

Moreover, "[i]nstructions must not be extracted piecemeal to establish error." *Case, supra* at 6. "Even if somewhat imperfect, instructions do not create error requiring reversal if, on balance, the theories of the parties and the applicable law are adequately and fairly presented to the jury." *Id*. Reversal for instructional error is only proper "where failure to do so would be inconsistent with substantial justice." *Id*.

We disagree with defendant's assertion that the instruction improperly established as fact that plaintiff would have reconnected the driveway at no expense to the owner. The last sentence of the instruction reads: "*If* you find that the driveway was reconfigured for other reasons, however, *and* that MDOT would have reconnected the driveway at no expense to the owner, no just compensation for reconfiguring the driveway may be awarded." (Emphasis added.) The instruction is clear that the jury must find both parts to be true in order to avoid awarding just compensation for the reconfiguration of the driveway. Further, the first part of the special instruction did not establish as fact that plaintiff would have reconnected the existing driveway at no expense to the owner. It merely states that the jury heard testimony to that effect. The instruction as a whole correctly conveyed that it was a question of fact for the jury to decide whether plaintiff would have reconnected the driveway.

Defendant also contends that the special instruction improperly stated the law because it relieved MDOT from its obligation to pay compensation if defendant rejected its "offer" to reconnect the existing driveway. Defendant maintains that the instruction implied that, if an offer was made and rejected, the agency had no responsibility to pay just compensation. MCL 213.55 does not require an owner to accept a government's good faith compensation offer or forgo compensation altogether. Rather, it provides a procedure for rejecting an offer, specifically the filing of a written claim. MCL 213.55(3). Once the claim is filed, the state agency may contest the claim and request a trial to determine the amount of just compensation due. MCL 213.55(1) and (3). Thus, it would be legally incorrect to instruct the jury that no compensation was required if the offer to reconnect the driveway was rejected. However, the challenged jury instruction did not address an offer or rejection related to the driveway. Rather, it simply stated that, if defendant did not need to reconstruct the driveway because of the partial taking and road construction, but did so for another reason, defendant could not hold plaintiff responsible for the

costs. This is a correct statement of law. Just compensation for property taken by a government agency is constitutionally required. *Dep't of Transp v VanElslander*, 460 Mich 127, 129; 594 NW2d 841 (1999). The purpose of just compensation is to restore the property owner to the position he would have been had the property not been taken. *Id*. Neither the public nor the property owner may be enriched at the other's expense. *Id*. The proper measure of damages in "a partial taking consists of the fair market value of the property taken plus severance damages to the remaining property if applicable." *Id.* at 130. Severance damages are measured by the "cost to cure" or the diminution in value of the remainder of the property. *Dep't of Transp v Sherburn*, 196 Mich App 301, 305-306; 492 NW2d 517 (1992). Accordingly, defendant's claim is without merit.

Defendant further argues that, under MRE 408, the trial court should have excluded from evidence the "offer" to reconnect because it was an offer of compromise and settlement.[1] However, at trial, no testimony established that MDOT made an "offer" that defendant rejected. Sandra Hoffman, MDOT's Grand Rapids region appraiser, testified that plaintiff's normal practice was to reconnect any driveway affected by a road project so that it functioned in the same manner it had before the project, but defendant's was not reconnected because defendant had alternate plans for a driveway. Again, she did not testify that an "offer" was made and rejected. Thus, there was no "offer of compromise" to be excluded under the rules of evidence. Further, if the "offer" to reconnect is considered to be part of the good faith offer required by the statute, MCL 213.55, the evidentiary rule, MRE 408, is not applicable to bar the evidence. *MDOT v Frankenlust Lutheran Congregation*, 269 Mich App 570, 580; 711 NW2d 453 (2006).

We further note that defendant focuses its arguments on the last sentence of the special instruction to the exclusion of the remainder of the special instruction and the instructions as a whole. Our Supreme Court has repeatedly upheld the well-established rule that "the fact that sentences are objectionable when considered independent of the context does not constitute reversible error" if the jury instruction, as a whole, correctly states the law. *Baker v Saginaw City Lines*, 366 Mich 180, 189; 113 NW2d 912 (1962). See also *Case, supra* at 6. One sentence cannot be extracted to find error. *Id.* Thus, the relevant question here is whether the special instruction and the rest of the instructions, on balance, adequately and fairly presented the parties' theories and applicable law.

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[1] MRE 408 provides, in part:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible.

We believe that the challenged instruction, when read in context with the remainder of the special instruction and the other instructions as a whole correctly stated the law and adequately and fairly presented the issues to be tried. The special instruction directed the jury that, if defendant was forced to reconfigure the driveway because of the partial taking, then he was entitled to compensation. However, if defendant reconfigured the shared driveway for reasons other than the taking, the taking was not the cause of the "damages" and compensating him for those expenses would not make him whole, but would improperly enrich him at the public's expense. See *Dep't of Transp v Frankenlust Lutheran*, 269 Mich App 570, 578; 711 NW2d 453 (2006).

Read as a whole, the special instruction fairly and adequately set out the evidence and issues as follows: (1) defendant claimed he spent money to construct a joint driveway; (2) plaintiff claimed the expense was unrelated to the partial taking; (3) plaintiff regulates driveways apart from building new roads and apart from its condemnation authority; (4) defendant should be made whole; and (5) it was the jury's obligation to determine whether the expense of the new driveway should be awarded to defendant to make defendant whole. The instruction was understandable, concise, conversational, and enhanced the ability of the jury to decide the case. *Novi, supra* at 630. Further, the instruction was not argumentative. Rather, it was supported by the evidence and did not invade the jury's province.

Moreover, when considering the instructions as a whole, and not just the special instruction, we believe that the theories of the parties and the applicable law were adequately and fairly presented to the jury. *Case, supra* at 6. The trial court gave the applicable condemnation instructions from Chapter 90 of the Model Civil Jury Instructions in addition to several special instructions. It properly instructed the jury that the property owner must be made whole and that "[t]he owner must not be forced to sacrifice or suffer by receiving less than full and fair value. . . ." The court also instructed the jury that "the owner is entitled to recover not only for the property taken but also for any loss in the value to his remaining property."

In reaching our conclusion, we note that the Michigan Supreme Court has held that it is not error to give a special instruction that emphasizes one party's theory as long as the full instructions fully and adequately explain the other party's theories. *Baker, supra* at 185. The challenged instruction discussed defendant's claim that the expenses were caused by the taking. The trial court made it clear to the jury, twice, that defendant has a right to be left in no worse position than before the taking. The trial court also added, on its own initiative, the final sentence: "Whether or not [defendant] was required as a result of the taking to construct a new drive is for you to decide based on the evidence." This sentence made it abundantly clear to the jury that it must decide the necessity of the expenses and compensate defendant if the expenses were incurred because of the taking.

For these reasons, the trial court did not abuse its discretion by giving the special instruction.

Affirmed.

/s/ Henry William Saad
/s/ Mark J. Cavanagh
/s/ Bill Schuette